IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALLSTATE TRANSPORTATION CO., INC.,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 97-1482
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	

M E M O R A N D U M

Padova, J. February , 1998

Before the Court is Plaintiff's Appeal of the Magistrate Judge's Order Granting Defendant Partial Judgment on the Pleadings, or, in the alternative, Motion for Leave to File its Second Amended Complaint (Doc. No. 17).[1] Specifically, Plaintiff asks the Court to reject that portion of the Magistrate's Report that recommends dismissal of Count Sixteen (Disparate Impact as a

[1] The Court's July 24, 1997 Order referring this case to Magistrate Judge Charles Smith pursuant to 28 U.S.C. § 636(c) was erroneous. Absent the parties' express written consent, this case should have been transferred to Magistrate Judge Smith pursuant to 28 U.S.C. § 636(b)(1) and Local Rule of Civil Procedure 72.1(I)(d)(1)(B). Accordingly, the Court will treat the Magistrate Judge's October 20, 1997 Memorandum and Order as a Report and Recommendation and Plaintiff's "appeal" as "written objections" thereto. See 28 U.S.C. § 636(b)(1)(A) ("a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except [...] a motion for judgment on the pleadings..."); Local Rule of Civil Procedure 72.1(I)(d)(1)("A magistrate judge may submit to a judge of the Court a report containing proposed findings of fact and/or recommendations for disposition by the judge of the following pretrial motions in civil [] cases: [...] B. Motions for judgment on the pleadings").

result of the 1997 Request for Proposals) ("1997 RFP"), Count Seventeen (Tortious Interference with Present and Prospective Contractual and Business Relations), and all of Plaintiff's claims for punitive damages.[2] For the reasons that follow, the Court will overrule Plaintiff's objections, adopt Magistrate Judge Smith's Report and Recommendation ("Report") in its entirety and dismiss Counts Sixteen and Seventeen of Plaintiff's Complaint and all of Plaintiff's claims for punitive damages.

I. Facts

For purposes of this de novo review, the Court incorporates by reference the factual findings set forth in Magistrate Judge Smith's Report.[3]

II. Standard

A Report and Recommendation is subject to de novo review by the district judge when it addresses dispositive issues. See 42 U.S.C. § 636(b)(1)(1993); Federal Rule of Civil Procedure 72(b)

[2] The Court also has reviewed the Report and Recommendation as it relates to Counts I, II, III, IV, V, XII, XIII and XIV and adopts Magistrate Judge Smith's findings and recommendations therein.

[3] Plaintiff makes no objections to any of the proposed factual findings in the Report.

(1997).[4] Dispositive issues include "those which are dispositive of a claim or defense of a party." See Blancato v. Saint Mary Hospital, No. Civ.A. 91-4114, 1993 WL 114421 at *2 (E.D.Pa. April 12, 1993).

The Court reviews a motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c) under the same standard as a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). See Constitution Bank v. DiMarco, 815 F.Supp. 154, 157 (E.D.Pa. 1993). Thus, in deciding a Rule 12(c) motion, a district court must view the facts and inferences to be drawn from the pleadings in the light most favorable to the non-moving party. Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 406 (3d Cir. 1993) (citations omitted). Under Rule 12(c), judgment will only be granted if it is clearly established that no material issue of fact remains to be resolved and that the movant is entitled to judgment as a matter of law. Jablonski v. Pan American World Airways, Inc., 863 F.2d 289, 290-91 (3d Cir. 1988). To survive a motion to dismiss, the plaintiff must set forth facts, and not mere conclusions, that state a claim as a matter of law. Sterling v. Southeastern Pennsylvania

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[4] Fed. R. Civ.P. 72(b) states in pertinent part:
A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.

Transportation Authority, 897 F.Supp. 893, 895 (E.D.Pa. 1995).

III. Discussion

Plaintiff challenges the following three recommendations set forth in Magistrate Judge Smith's Report:

(A) Dismissal of Count 16 - Allstate's Claim that SEPTA's 1997 Request for Proposals Had a Disparate Impact on Minority Businesses;

(B) Dismissal of Count 17 - Allstate's Claim that SEPTA has Tortiously Interfered with its Present and Prospective Contractual and Business Relations;

(C) Dismissal of Allstate's Demand for Punitive Damages.

The Court will address each objection in turn.

A. Count 16 - Allstate's Claim that SEPTA's 1997 Request for Proposals had a Disparate Impact on Minority Businesses

Plaintiff objects to the Report's recommendation of dismissal of Count 16 on the following two grounds.

1. The Croson Case

Plaintiff argues that Magistrate Judge Smith misinterpreted the holding of the Supreme Court's decision in City of Richmond

v. J.A. Croson Co., 488 U.S. 469 (1989) when he relied on Croson to dismiss Plaintiff's claim for disparate impact. Croson, Plaintiff argues, indicated that the general requirement of performance bonds for a public contract does not have a disparate impact on minority businesses. However, this statement does not apply in the instant case, Plaintiff continues, because "the issue in this case is whether certain 'individual specifications and limitations,' including an extraordinarily high performance bond requirement, set by SEPTA in its 1997 RFP, caused a disparate impact on minority businesses." (Pl.'s Objs. at 3.) Thus, Plaintiff concludes, Magistrate Judge Smith's reliance on Croson was misplaced.

The Court disagrees. Croson clearly covers the scenario at issue here. In Croson, the Supreme Court states that a bonding requirement is a "nonracial factor[] which would seem to face a member of any racial group attempting to establish a new enterprise." Croson, 488 U.S. at 498. Nonetheless, Plaintiff contends that Croson does not govern the instant case because this case involves an "unusually high bond requirement." (Pl.'s Objs. at 5.) However, Plaintiff fails to substantiate this contention in its pleadings. Instead, Plaintiff argues that it has satisfied the "statistical showing" of racial imbalance that is necessary to make out a case of disparate impact. Wards Cove Packing Co., Inc. v. Antonio, 490 U.S. 642, 657 (1989). In order

to make such a showing, the Amended Complaint must contain sufficient allegations to indicate a statistical disparity between members of the protected and unprotected classes. Di Biase v. SmithKline Beecham Corp., 48 F.3d 719, 730 (3d Cir. 1995).

Reading the Amended Complaint in the light most favorable to Plaintiff, the Court cannot conclude that Plaintiff has alleged the type of statistical disparity necessary to make out a claim for disparate impact, nor can the Court agree with Plaintiff that Croson does not apply to the instant case. In its Amended Complaint, Plaintiff alleges that "only the largest and most well-funded corporation could possibly consider bidding on this work" and that "no small or DBE paratransit provider could ever have bid on this work." (Am. Compl. at ¶ 186.) Plaintiff does not allege satisfactorily that the high bond requirement would affect non-minority owned firms differently. In the words of Magistrate Judge Smith, "Any small business is affected by such a steep bond requirement - nothing in the Amended Complaint explains how this has a greater effect on minorities. Nor does plaintiff allege any demonstrated impact on other DBEs aside from broad legal conclusions that minorities were excluded." (Report at 19-20.)

2. The "Other" Requirements

In addition to the bond requirement, Plaintiff argues that

Defendant "installed other (albeit unnamed in the Complaint) requirements that had a disparate impact on DBEs/MBEs."[5] (Pl.'s Objs. at 7 (emphasis added).) Plaintiff asks the Court to look past its failure to allege specifically the additional requirements that it is challenging because at the time Plaintiff filed its Amended Complaint, it was not clear, which, if any, of the potentially objectionable "requirements and specifications" would remain in the 1997 Request for Proposal ("RFP"). In addition, Plaintiff argues, if it had alleged specific objectionable "requirements and specifications," Defendant may have removed those requirements or altered their form in the revised RFP.

While the Federal Rules of Civil Procedure do not require detailed pleading, plaintiff must at least set forth the requirements that it is challenging. See Sterling, 897 F.Supp.

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[5]Count XVI of Plaintiff's Amended Complaint, reads in pertinent part as follows:

> **196**. On May 14, 1997, SEPTA distributed its RFP for the work previously performed by Access (and then taken over by SEPTA/Freedom) and Allstate. The RFP contained numerous individual specifications and limitations restricting the types of firms which would be able to bid on any of the paratransit work. In particular, these specifications and limitations precluded small DBE firms from bidding on this work.
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> **197**. Such specifications and limitations disparately impacted on Allstate, in that they completely precluded Allstate, as a small, disadvantaged business enterprise, or DBE, from even participating in the bid process, and thus precluded Allstate from being able to win a contract for this work.

893, 895 (E.D.Pa. 1995) ("To survive a motion to dismiss, the plaintiff must set forth facts, and not mere conclusions, which state a claim as a matter of law"). In order to establish a prima facie case under a disparate impact theory, Plaintiff must identify a specific practice of the defendant and demonstrate that its application had a disparate impact on a protected class. See Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 642 (3d Cir. 1993). Plaintiff concedes that at the time it filed its Amended Complaint it was not certain as to the nature of the requirements it was challenging. If Plaintiff had no specific requirements in mind in the writing of its Amended Complaint, certainly Plaintiff cannot expect the Court to determine, even reading the Amended Complaint in the light most favorable to it, that the pleading requirements have been met. As to Plaintiff's argument that it should be excused from specifying the allegedly offending provisions because, had it done so, Defendant may have cured the claimed defects, the Court is unmoved. The Court assumes that Plaintiff brings this lawsuit to rectify any and all allegedly discriminatory conduct. If Plaintiff's action had resulted in movement toward that ultimate goal, the Court is confident that Plaintiff would not object.

Accordingly, Count 16 will be dismissed.

B. Count 17 - Allstate's Claim that SEPTA has

Tortiously Interfered with its Present and Prospective Contractual and Business Relations

Count Seventeen embraces two separate but related intentional torts: (1) interference with contractual relations and (2) interference with prospective business relations. Both torts are recognized in Pennsylvania. Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198 (1979); Glenn v. Point Park College, 441 Pa. 474, 476 (1971). To state a claim for tortious interference with contractual relations or prospective contractual relations, the Complaint must allege (1) an existing or prospective contractual relationship between the plaintiff and third parties; (2) a purpose or intent to harm the plaintiff; (3) the absence of privilege or justification on the part of the defendant; and (4) the occurrence of actual harm or damage to the plaintiff as a result of the defendant's conduct. Centennial School District v. Independence Blue Cross, 885 F.Supp. 683, 688 (E.D.Pa. 1994). If existing contracts were interfered with, the plaintiff "should be able to make some allegations regarding what contracts or types of contracts these were." Id.

1. Present Contractual Relations

In its Amended Complaint, Plaintiff alleges that Defendant's actions have interfered with "Allstate's present contract and business relationships with third parties, including essential subcontractors of Allstate" and "Allstate's other ParaTransit

business relationships." (Am. Compl. at ¶¶ 199, 201.) Nowhere in the allegations does Plaintiff state which of these "present contract and business relationships" and "subcontracts" are being interfered with. As the Magistrate Judge correctly noted, although the Federal Rules of Civil Procedure do not require the complainant to set forth in detail the facts upon which the claim is based, the "short and plain statement of the claim" must be sufficient to give the defendant notice of the claim and the grounds upon which it is based. (Report at 26.) Plaintiff's allegations fail to provide Defendant with adequate notice.[6] The Court agrees with Defendant's statement that, "If contracts with 'third parties' is sufficiently specific then virtually any plaintiff could state a claim for tortious interference." (Def.'s Opp. Br. at 9.)

2. Prospective Contractual Relations

With respect to prospective contractual relations, there must be an objectively reasonable probability that a contract

[6] The Court agrees with Magistrate Judge Smith's determination that Plaintiff's reliance on Fluid Power, Inc. v. Vickers, Inc., Civ.A.No. 92-0302, 1993 WL 23854 at *4 (E.D.Pa. Jan. 28, 1993) is misplaced. Plaintiff's allegations in this case simply failed to provide enough information to support the admittedly low threshold for pleading a claim for tortious interference. "While Plaintiff was not required to list each name within its complaint, proper notice pleading would have at least referred to [the 1996 Rider Choice RFP] and the names within it. A mere allegation that includes all business relationships with third parties, subcontractors and other ParaTransit business relationships does not satisfy the requirement of notice." (Report at 26 n.16.)

will come into existence. Kachmar v. Sungard Data Systems, Inc., 109 F.3d 173, 184 (3d Cir. 1997). It must be something more than a "mere hope." Thompson Coal Co., 488 Pa. at 208. Under Pennsylvania law, merely pointing to an existing business relationship or past dealings does not reach the level of "reasonable probability." See General Sound Telephone Co., Inc. v. AT&T Communications, Inc., 654 F.Supp. 1562, 1565 (E.D.Pa. 1987).

Plaintiff's allegations simply do not satisfy the reasonable probability standard. Once again, Plaintiff makes general allegations that provide insufficient notice to Defendant. Plaintiff alleges, "SEPTA representatives...have also intentionally attempted to interfere with Allstate's future contract and business relationships with third parties, including essential subcontractors of Allstate." (Am. Compl. at ¶ 203.) Based on this allegation, Defendant cannot be expected to discern which prospective contracts allegedly have been interfered with. Furthermore, these alleged contracts are not reasonably probable. Past dealings alone are not sufficient to support a claim of intentional interference with business relationships. See General Sound, 654 F.Supp at 1565 (holding that under Pennsylvania law, the existence of a prospective contractual relation requires "considerably more than a reasonable probability of a chance to obtain a contract"). It is true, as

Plaintiff notes, that "prospective contractual relationships are by definition more difficult to identify precisely." Centennial, 885 F.Supp. at 688. However, unlike the circumstances in Jeanette Paper Co. v. Longview Fibre Co., 378 Pa. Super. 148 (1988), Plaintiff's conclusory allegation that "based on Allstate's previous contracts with such essential subcontractors and other ParaTransit business relationships, future contractual relationships were reasonably probable," is not enough to satisfy the burden of showing that there was a reasonable likelihood of an uninterrupted and prospective relationship. (Am. Compl. at ¶ 203.) Therefore, Plaintiff's tortious interference claim will be dismissed.

C. Allstate's Demand for Punitive Damages

The Court finds Magistrate Judge Smith's analysis of Plaintiff's demand for punitive damages persuasive. As the Magistrate explains, in the Third Circuit, "SEPTA, like a municipality is immune from punitive damages under § 1983. In view of the many characteristics that SEPTA shares with federal, state, and local agencies, both history and policy considerations support this conclusion." Bolden v. Southeastern Pennsylvania Transportation Authority, 953 F.2d 807, 830 (3d Cir. 1991). In addition, "[a]warding punitive damages against SEPTA might result in increased taxes or fares and thus punish taxpayers and users

of mass transportation who cannot be regarded, except perhaps in an indirect and abstract sense, as bearing any guilt for constitutional violations that SEPTA may commit." Id. at 830. Plaintiff presents no tenable argument for why its punitive damages claim is unique. Rather, this Court finds that Plaintiff's claim is indistinguishable from those claims for which awards of punitive damages against SEPTA have been rejected. See Bolden, 953 F.2d at 829-30; Feingold v. SEPTA, 512 Pa. 567, 580 (1986) ("it would be inappropriate to assess punitive damages against SEPTA given its status as a Commonwealth agency"). Accordingly, each of Plaintiff's seventeen prayers for punitive damages must be dismissed.

IV. Leave to File an Amended Complaint

In the alternative, Plaintiff seeks leave to amend its Amended Complaint on both Counts 16 and 17. Under Fed. R. Civ. P. 15(a), "a party may amend a pleading at any time prior to the service of a responsive pleading. If a responsive pleading has been filed, then a party may amend a pleading only upon leave of the court or written consent of the adverse party." Glaziers & Glass Workers v. Janney Montgomery Scott, 155 F.R.D. 97, 99 (E.D. Pa. 1994) (citation omitted). "Although leave to amend a complaint should be freely granted in the interests of justice, a motion to amend is committed to the sound discretion of the

district judge." Gay v. Petsock, 917 F.2d 768, 772 (3d Cir. 1990) (citations omitted). The Court should freely exercise this discretion in "the absence of any apparent or declared reason -- such as [1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [5] futility of the amendment, etc." Foman v. Davis, 371 U.S. 178, 182 (1962).

Plaintiff now seeks leave to amend its Complaint again, asserting that at the time it originally amended its Complaint, the response date for the 1997 RFP had not yet arrived. However, even when Plaintiff had the opportunity to indicate the specifics underlying its deficient pleadings, it failed to do so. Nowhere in Plaintiff's Objections does it identify the specific terms of the 1997 RFP which it claims had a disparate impact on minorities. Nowhere does it suggest that specific contracts exist with which Defendant interfered. No proposed Amended Complaint was attached to Plaintiff's Objections shedding light on what Plaintiff might offer to substantiate its deficient pleadings. Plaintiff simply repeatedly refers to the fact that at the time it originally amended its Complaint, it was only able to allege general terms. Plaintiff has made no showing that the defects in Counts 16 and 17 are remediable.

At this point in the case, discovery is underway and experts have been identified. Defendant asserts that the revival of Counts 16 and 17 would require new discovery and expert testimony regarding the allegedly disparate impact on minorities of the 1997 RFP. I have no reason to believe otherwise. Magistrate Judge Smith has already put this allegedly complex case on an appropriate schedule to facilitate its movement through the process. Allowing leave to file an unspecified amended complaint would constitute a serious disruption to this Court's case management plan without demonstrated reason to do so. Therefore, because Plaintiff has failed to provide this Court with a satisfactory basis to determine that "justice so requires" the granting of leave to file a second amended complaint, I will deny Plaintiff's Motion. Fed. R. Civ. P. 15(a).

An appropriate Order follows.

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SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	

O R D E R

AND NOW, this 12th day of February, 1998, after consideration of Defendant's Motion for Partial Judgment on the Pleadings (Doc. Nos. 10, 11 & 14), Plaintiff's Response (Doc. Nos. 13 & 15), and after review of Magistrate Judge Smith's Memorandum and Order, herein referenced as the Report and Recommendation (Doc. No. 16), Plaintiff's Appeal, herein referenced as Objections and Plaintiff's Motion in the Alternative for Leave to File an Amended Complaint (Doc. No. 17) and Defendant's Response (Doc. No. 18), it is **HEREBY ORDERED** that:

1. Plaintiff's Objections are **OVERRULED**.

2. Magistrate Judge Smith's Report and Recommendation is **ADOPTED** in its entirety.

3. Counts 16, 17 and all of Plaintiff's claims for

punitive damages are **DISMISSED**.

4. Plaintiff's Motion, in the Alternative, for Leave to File an Amended Complaint is **DENIED**.

BY THE COURT:

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John R. Padova, J.